No. 93-73

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Supreme Court of the United States

October Term 1993

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS,

v.

LEGALIZATION ASSISTANCE PROJECT OF THE LOS ANGELES COUNTY FEDERATION OF LABOR, ET AL., RESPONDENTS.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

In this case the Immigration and Naturalization Service's ("INS") Petition for Writ of Certiorari ("Cert.Pet.") does not seek plenary review of important or novel questions of law. Instead, the petition asks this Court to grant certiorari, vacate and remand so that the lower courts may reconsider in light of this Court's decision in *Reno v. Catholic Social Services, __ U.S. __, 113 S.Ct. 2485 (1993)* (*"CSS"*). What petitioners fail to mention is that the lower courts in this case are *already* considering the impact of this Court's decision in *CSS*. For that task to be accomplished, there is no need for this Court to grant certiorari, vacate and remand. The petition for certiorari is therefore without merit or purpose.

The petition raises five questions, of which three are wholly jurisdictional (Questions Presented 1-3), and two are

substantive (Questions Presented 4-5). However, the INS does not ask this Court to review *any* of these issues. On the procedural issues the INS concedes that "there is no need for plenary review," and instead urges that "the appropriate course" would be for this Court to vacate and remand for further proceedings in light of *CSS*. Cert.Pet. at 8-9. Then, if the lower courts "adhere[] to [their jurisdictional] conclusion on remand, review in this Court might be warranted at that time." *Id.* at 9. Even as to the two substantive issues presented for review, the INS simply wants this Court to vacate and remand so that the lower courts may "reexamin[e]" these issues. Cert.Pet. at 10 and 15. But, unlike the court of appeals' decisions which this Court vacated and remanded in *CSS* and *Ayuda v. Reno*, 948 F.2d 742 (D.C. Cir. 1991), *vacated*, No. 91-1924 (June 28, 1993), in this case the court of appeals itself remanded to the district court for further proceedings. App. 39a ("we ... remand for further proceedings").

Further mitigating against granting the petition is the fact that petitioners have already filed a motion to dismiss in the district court raising the *same* jurisdictional issues presented in the petition for certiorari--*i.e.* the impact of this Court's decision in *CSS*. When that motion was denied, petitioners appealed, again raising the jurisdictional issues presented in the petition for certiorari. The appeal is now pending in the court of appeals.

The district court has yet to act on several issues--including the standing of individual plaintiffs, class certification, possible summary judgment motions and final relief--in light of this Court's decision in *CSS* and the Circuit's earlier

remand in this case. Until it does, and its orders are reviewed in the court of appeals, the petition for certiorari is premature.

STATEMENT

1. Congress passed the Immigration Reform and Control Act of 1986 ("IRCA"), Pub.L. 99-603, 100 Stat. 3359, to create a comprehensive program to regulate immigration to the United States. One of IRCA's purposes is to grant legalization to certain groups of immigrants with longstanding residence in the United States. 8 U.S.C. § 1255a; *see generally CSS*, 113 S.Ct. at 2489-90. IRCA created the legalization program at issue in this case by adding § 245A to the Immigration and Nationality Act, codified at 8 U.S.C. § 1255a. To qualify for legalization, an applicant must have, *inter alia*, resided continuously in the United States in unlawful status since before 1982, 8 U.S.C. § 1255a(a)(2)(A). An immigrant who lawfully entered the United States with a visa prior to 1982, can meet the continuous unlawful residence requirement by showing that s/he violated status prior to 1982, and that the violation of status was "known to the government" as of January 1, 1982. 8 U.S.C. § 1255a(a)(2)(B).

2. The INS issued policies and later promulgated regulations interpreting the "continuous unlawful residence" and "known to the government" requirements. *See* 8 C.F.R. §§ 245a.1(d), 245a.2(b) (1992). Respondents, including several religious, community and labor non-profit groups providing legal assistance to legalization applicants,[1] and fourteen

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[1] The organizational plaintiffs include the Immigrant Assistance Project of the Los Angeles County Federation of Labor (AFL-CIO), Travelers and Immigrants Aid of Chicago, Hermandad Mexicana Nacional, the Washington Association

individuals claiming eligibility for legalization,[2] challenged INS's policies and regulations on both statutory and constitutional grounds. App. 4a.

3. Plaintiffs sought relief on behalf of three categories of applicants *all deemed ineligible for legalization* by the INS.

Category 1 applicants: Category 1 includes applicants whose unlawful status was "known to the Government" because, prior to 1982, they failed to comply with INA § 265 which required *all* aliens residing temporarily in the United States to report their addresses to the INS each quarter and each year. 8 U.S.C § 1305; App. 13a. The violation was "known to the Government" because the Government had no periodic address report on file as required by statute, although it did have on file a record of the alien's admission. App. 21a ("the INS had actual knowledge of an alien's unlawful status").

Category 2 applicants: In its implementation of the statute requiring that certain violations be "known to the Government" before 1982, the INS divided identically situated

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of Churches, One Stop Immigration, International Institute (San Francisco), and International Institute (East Bay). CR 44; *Immigrant Assistance Project v. INS*, 709 F.Supp. 998, 1004 n. 4 (W.D. Wash. 1989).

[2] The individual plaintiffs were dismissed when the district court held that they lacked standing because the Amended Complaint failed to state that they had timely filed legalization applications and the court concluded it was without authority to grant an extension for plaintiffs who failed to file timely applications. App. 41a, 55a. The court of appeals ordered the district court to reconsider this portion of its decision on remand. App. 38a, n. 40. The district court has not yet reconsidered this matter.

nonimmigrant visa holders into two categories. The first category[3] was *not* required to prove that its violations of status were actually "known to the Government" as of January 1, 1982. Seemingly because third parties--employers or schools--were required to report to the INS violations of status by these nonimmigrants, and the agency had since destroyed such records, INS policy assumed these nonimmigrants' violations were "known to the Government" prior to January 1, 1982.

Applicants falling into a second category of nonimmigrants,[4] however were required to prove by way of largely unavailable documentation[5] that their unlawful status was "known to the Government" prior to 1982. In these cases, as with the first category, third parties--again employers and schools--were required to report violations to the INS.

The district court concluded that "the distinction between A, G, and graduated F visa applicants on the one hand, and H,

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[3] This category includes (1) students admitted under d/s "**F**" visas who remained in the United States after they graduated; (2) foreign government employees admitted on "**A**" visas; and (3) representatives of international organizations admitted on "**G**" visas. 8 C.F.R. §.245a.2(b)(11)-(12). *See also* App. 25a-26a.

[4] This second category includes those admitted as (1) temporary employees on "**H**" visas, (2) intra-company transfers on "**L**" visas,, and (3) students on d/s "**F**" visas who do not graduate. App. 25a.

[5] There is no disagreement that INS has destroyed the vast majority of records relating to reports of violations of nonimmigrant status prior to January 1, 1982, leaving thousands of applicants in the second category unable to prove that INS had knowledge of their violations prior to January 1, 1982. CR 86 at 2-6.

L, and non-graduating F visa applicants makes no sense," App. 48a, and "create[s] an irrational distinction among legalization applicants" which violates the equal protection guarantee. *Id.* The court of appeals agreed that INS's distinction between the two categories of nonimmigrants was irrational. App. 27a-28a.

Category 3 applicants: The dispute over this final category of applicants centers on INS's denial of legalization to aliens who, "by misrepresentation or mistake, [were] incorrectly reinstated to lawful status sometime after January 1, 1982." App. 49a. INS argued that despite the fact that the reinstatement was accomplished by fraud or misrepresentation, it broke the continuity of the alien's "unlawful" residence. Plaintiffs argued, and the lower courts agreed, that the granting of an immigration benefit through misrepresentation did not break unlawful residence--a benefit obtained by fraud or mistake is invalid *ab initio*. App. 31a-32a.

4. The record in this case amply demonstrates that the policy positions adopted by the INS were widely publicized by the agency during the amnesty application period. Specifically recognizing the need to reach uninformed potential legalization applicants regarding their rights under IRCA, Congress included section 201(i) in the bill. *See* Report of the House of Representatives Committee on the Judiciary, at 73, H.R. Rep. No. 99-682 (Part I), 99th Cong., 2d Sess. (1986). Section 201(i) provides that "the Attorney General, in cooperation with qualified designated entities, *shall broadly disseminate information respecting the benefits which aliens may receive*

under this section and the requirements to obtain such benefits." *Id.* (emphasis added).[6]

Applicants who went directly to the INS regularly had their applications rejected out of hand. No formal filing ever took place. The INS Legalization Manual (1987) states that

> [i]f there are major deficiencies in the application package or *if the applicant is statutorily ineligible, [and, of course, the INS deemed Categories 1-3 members to be statutorily ineligible] the application will be rejected by the LA* [Legalization Assistant] . . .

Id. (emphasis added).

The record in this case is replete with references to INS's implementation of the policies declared unlawful and unconstitutional by the lower courts.

As to Category 1 applicants, respondent Hermandad Mexican Nacional testified that INS officials issued "clear statements" that such applicants were ineligible. CR 88, B36:25-37:3. It estimated that ten percent of all of its 20,000 cases involve Category 1 members. *Id.*, B44:8-9. The International Institute of San Francisco testified that it identified "approximately forty" Category 1 clients. *Id.*,

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[6] Both the House and the Senate versions of the bill directed the government to disseminate information respecting the benefits aliens may receive under the legalization program and the requirements to obtain such benefits. *See* Conference Committee Report, at 92-93, H.R. Rep. No. 99-1000, 99th Cong., 2d Sess. (1986). INS awarded a $10.7 million public information contract to implement its publicity obligations under the statute. *Interpreter Releases*, Vol. 64 at 470 (April 20, 1987).

D55:18-22. Clients who *insisted* on filing were advised by the INS that their applications "will be denied." *Id.*, D58:9.

Category 2 applications were also improperly rejected and denied by the INS. Respondent Hermandad Mexicana Nacional testified as to INS's policy as follows: "We had some students who tried to get information from the school . . . The INS said, 'There is no record on you. We can't find it or we never received it' . . . *That ended it.*" CR 88, B42:12-19 (emphasis added). INS's policy made it "almost impossible" for the applicant to file or have approved his case. *Id.* B42:21.

As to Category 3 applicants, those whose applications were unlawfully rejected or denied because INS deemed their unlawful reinstatements to have broken their unlawful residence, while the INS issued a "precedent" decision (*Matter of N*) *after the application period ended* reversing prior agency policy, it refused to reopen the cases of applicants previously denied or accept and process applications improperly rejected.

While *Matter of N* may now be a precedent decision, INS Assistant Commissioner for Legalization O'Reilly testified that *"there has been no instructions telling [INS legalization staff] to go back and identify and reopen such cases." I d.*, P.Ex. A15:1-4 (emphasis added). Mr. O'Reilly testified that no such instruction would be issued in the future. *Id.* A15:6-11.

The record indicates that "hundreds" or "several thousand" people fall into Category 3. *Id.*, D76:11-25. These applicants have been advised by the INS that they are ineligible and were discouraged from filing applications. *Id.*, D78:22-23. *See also id.*, G94:10-20, G95:6-23; E81, ¶¶ 12-13; E80, ¶¶ 10 and 14 and G96; I114, ¶¶ 5-6; K144 ¶ 6.

5. The district court issued several orders denying plaintiffs' motion for class certification, App. 57a-58a,[7] denying INS's motion to dismiss on jurisdictional grounds, App. 52a-53a, denying relief in the form of an order requiring the INS to adjudicate previously rejected applications, App. 59a-60a,[8] and generally granting respondents declaratory and limited injunctive relief (identification and reopening of Category 1 and 3 cases; notice to persons in Categories 1 through 3). App. 13a-36a.

6. On appeal, the agency maintained that its policies and regulations were valid and that the district court, in any event, exceeded its authority to grant relief. The respondents asserted on cross-appeal that the district court erred by denying class certification, dismissing the individual plaintiffs and denying portions of the injunctive relief requested. On September 18, 1992, the court of appeals issued its decision affirming in part, reversing in part, and remanding to the district court for further proceedings. App. 39a.

7. The INS then filed the present petition for certiorari setting forth three justiciability issues and two substantive issues (regarding only Categories 1 and 2) for review. Cert.Pet. I. However, as to *all* of the issues raised in the petition, the INS argues that rather than reviewing them at the present time, this Court should grant certiorari, vacate and remand for further proceedings in light of this Court's decision in *CSS*.

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[7] The Circuit ordered the district court to reconsider its denial of class certification on remand. App. 37a-38a n. 40.

[8] The Circuit ordered the district court to reconsider this issue on remand. App. 36a-37a.

8. At the same time as the INS is seeking certiorari before this Court--and without advising it of the agency's parallel efforts in the district court--the INS presented the same jurisdictional and ripeness issues to the district court (on remand) in a motion to dismiss the complaint in light of this Court's decision in *CSS*. Defendants' Motion to Dismiss Complaint in Light of *Reno v. CSS*, filed July 8, 1993 ("Defs' Motion to Dismiss").[9] After full briefing, the district court denied INS's motion to dismiss. Order Denying Defendants' Motions to Vacate and to Dismiss in Light of *CSS*, filed Aug. 25, 1993 ("Order Denying Mo. to Dismiss").[10] In denying defendants' motion, the district court carefully considered the reasoning of this Court's decision in *CSS*. *Id.* at 2-7.

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[9] Defendants' motion to dismiss raised several issues in light of this Court's decision in *CSS*, including the subject-matter jurisdiction of the district court, the ripeness of plaintiffs' claims, the district court's authority to grant relief in the form of an extension of the application period (something the district court had not yet done), the district court's jurisdiction over the "front-desked" applicants discussed in this Court's decision in *CSS*, and the absence of standing of the plaintiff organizations. Defs' Motion to Dismiss at 3-12. Rather than asking the district court to determine whether any applicants were "front-desked," as this Court instructed the lower courts to do in *CSS*, 113 S.Ct. at 2500, the INS simply asked the court to "dismiss the complaint." Def's Motion to Dismiss at 12. As discussed in the accompanying text, the district court declined to do so.

[10] As explained *infra*, INS's motion to vacate addressed an interim relief order issued by the district court to protect putative class members from deportation pending the completion of the litigation.

9. On September 15, 1993, petitioners filed a notice of appeal in the Ninth Circuit Court of Appeals from the district court's denial of their motion to dismiss. As they argue in their petition for certiorari, in their docketing statement filed with the Court of Appeals the INS alleges that, in light of this Court's decision in *CSS*, "the district court lacked subject matter jurisdiction over unripe claims" and "lacks jurisdiction to grant relief to alien beneficiaries." Civil Appeals Docketing Statement dated September 23, 1993. Therefore, INS is already getting what it wants here--namely consideration in light of this Court's decision in *CSS*--without this Court having to grant certiorari, vacate and remand.

10. Following remand to the district court by the Court of Appeals, respondents sought and obtained an *interim* relief order aimed at protecting putative class members from deportation pending the conclusion of the litigation. Memorandum Decision and Order Granting Interim Protective Relief, filed June 1, 1993. Similar interim relief orders were issued in *Catholic Social Services* and *LULAC v. INS*. *See CSS*, 113 S.Ct. at 2493, n. 13. While this Court vacated the underlying orders in *CSS* and *LULAC*, and remanded for further proceedings, it did not disturb the interim relief orders issued in those cases. *Id.* Nevertheless, in this case the INS filed a motion asking the district court to vacate its interim relief order in light of this Court's decision in *CSS*. After full briefing, that motion was denied in the same order that the district court denied the motion to dismiss. Order Denying Mo. to Dismiss, at 6 (the interim relief order "is not a final remedial order. Rather, it simply provides interim protective relief to persons whose rights may be affected by the final decisions

made by the courts ... That relief is essentially limited to notice ... and temporary stays of deportation"). INS's objection to the issuance of interim relief was based on its interpretation of this Court's decision in *CSS*, and the agency has appealed the grant of interim relief to the Ninth Circuit.

REASONS FOR DENYING THE PETITION

1. Subject Matter Jurisdiction

In less than one page and virtually without analysis, the INS first argues that the district court lacked subject matter jurisdiction to review the respondents' challenges to INS policy and regulations. Cert.Pet. at 6. Conceding that this Court "did not accept the government's [jurisdictional] arguments" in *CSS*, *id.*, petitioners proceed to misconstrue what this Court did hold in that case. *Id.* ("the Court vacated ... on the grounds ... that the claims of individual applicants were not yet ripe for review, and that when they become ripe, the exclusive statutory review procedures in 8 U.S.C. § 1255a(f) would have to be followed"). Had this Court determined unequivocally that when the *CSS* plaintiffs' claims "become ripe, the exclusive statutory review procedures" preclude district court review, it would not have remanded to the district court for further factual development on applicants who were "front-desked," since these applicants were permitted to pursue their claims in federal court on the basis that they had constructively filed timely applications. 113 S.Ct. at 2500-2501. As this Court stated in *CSS*, "[t]he INS gives us no reason to reverse course [from the Court's decision in *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 499, 111 S.Ct. 888, 112 L.Ed.2d 1005 (1991)], and we reject its argument that § 1255a(f)(1) precludes district court jurisdiction over an action challenging the legality

of a regulation without referring to or relying on the denial of any individual application." 113 S.Ct. at 2495.

INS now asks this Court to grant certiorari, vacate and remand solely for the purpose of allowing the lower courts in this case to "reconsider in light of *CSS* ..." Cert.Pet. at 6. However, the INS is *already* seeking such reconsideration in the lower courts in this case. INS's initial effort in that regard was to file a motion in the district court for dismissal of the complaint in light of *CSS*. The district court, guided by this Court's *CSS* decision, denied that motion. The INS's appeal is now pending before the Ninth Circuit, and its notice of appeal raises the impact of *CSS* on the issues involved in this case. Moreover, the district court has yet to rule on other matters which will involve application of this Court's decision in *CSS*, including the status of individual plaintiffs, class certification, reconsideration of substantive rulings and issuance of final relief. When these matters are ruled upon, the district court will obviously consider--as it did in passing on INS's motion to dismiss--this Court's decision in *CSS*.

In short, there is no reason for this Court to grant certiorari, vacate and remand solely so that the district court can consider the impact of this Court's decision in *CSS*. Unlike the final judgments issued by the courts of appeals in *CSS* and *Ayuda*, in this case the court of appeals itself remanded for further proceedings and there is no basis at all for believing that the district court will not *fully* consider the impact of this Court's decision in *CSS* as it addresses issues the parties will bring before it in the coming months.[11]

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[11] As we informed this Court in our prior applications for extensions to file this opposition, the parties are currently

2. Extension of the Application Deadline

INS's petition for certiorari also asks this Court to review the Court of Appeals' decision regarding "extension of the application deadline ..." Cert.Pet. at I (Questions Presented #2); *id.* at 5-6. The agency argues that this Court's decision in *CSS* "casts considerable doubt on the Ninth Circuit's holding in this case--which relied on the Ninth Circuit's now-vacated decision in *CSS* ... that the district court could entertain respondents' claims and extend the application deadline." Cert.Pet. at 6. Accordingly, defendants urge that "as it did in *Ayuda, Inc. v. Reno*, No. 91-1924 (June 28, 1993), with respect to the D.C. Circuit's decision involving similar claims, [this] Court should vacate ... and remand the case for further consideration in light of *CSS* ..." Cert.Pet. at 6.

What defendants fail to point out is that the D.C. Circuit in *Ayuda* had issued a final judgment which this Court believed should be reconsidered in light of the decision in *CSS*. In contrast, in this case the court of appeals neither granted nor denied an extension. Instead, it remanded so that the district court could reconsider its denial of an extension. App. 36a-37a. The district court has yet to do so. When it does, it will clearly consider and be guided by this Court's decision in *CSS*, just as it did when it considered petitioners' motion to dismiss. In short, there is no reason to grant certiorari, vacate and remand for further consideration of the extension issue in light

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engaged in settlement discussions aimed at resolving this and all other pending amnesty cases, including *CSS*. Respondents are now optimistic that those settlement discussions will be successful and may obviate the need for any further district court proceedings in this case.

of this Court's decision in *CSS*. The matter of an extension has already been remanded to the district court which will clearly issue a decision taking into account the law as expressed by this Court in *CSS*.

3. Organizational Standing

The petition attacks the court of appeals' decision that the organizational plaintiffs have standing. Pet.Cert. at I (Question Presented 3); *id.* at 6. While challenging the court of appeals' analysis on organizational standing, Pet.Cert. at 7, INS nevertheless concedes that "there is no need for plenary review of the organizational standing question at this time." *Id.* at 8. Instead, INS argues, "the appropriate course would be for the court of appeals to reconsider the organizational standing portion of its decision in light of this Court's analysis in *CSS* ... If the court of appeals adheres to its conclusion on remand, review in this Court might be warranted at that time." *Id.* at 9.

First, at the same time as defendants have raised this issue in their petition for certiorari, they raised the identical issue in their motion to dismiss before the district court. Motion to Dismiss at 11-12 ("*CSS* makes clear that the organizations fail the prudential 'zone of interest' test"). Petitioners' motion to dismiss the organizational plaintiffs in light of *CSS* was denied. Order Denying Mo. to Dismiss, at 6. Petitioners have appealed that decision to the court of appeals and will there seek consideration of the organizational plaintiffs' standing in light of this Court's decision in *CSS*. Therefore, although for different reasons, we agree with the INS that "there is no need for plenary review of the organizational standing question at this time." Cert.Pet. at 8. "If the court of appeals adheres to its conclusion on [organizational standing], review in this Court

might be warranted at that time." *Id.* at 9. Plenary review is clearly not warranted at this time as the issue that concerns petitioners is raised in their present appeal to the Ninth Circuit.

Second, assuming *arguendo* this Court does not believe defendants' present appeal to the Ninth Circuit will result in reconsideration of the organizational standing issue in light of *CSS*, the issue is not worthy of plenary review.[12]

INS points out that the Circuit's decision that the organizational plaintiffs have standing "was not based on the theory that they may challenge INS's legalization actions as representatives of their members." Cert.Pet. at 6. While this may be true, as petitioners acknowledged in the court of appeals, some of the organizational plaintiffs, including the Immigrant Assistance Project (AFL-CIO) and Hermandad Mexicana Nacional, alleged organizational injury *and* membership injury. Plaintiff Immigrant Assistant Project testified regarding six members injured by petitioners' challenged policies and regulations. CR 88, I112, para. 2. The allegations in plaintiffs' First Amended Complaint show that

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12 Of the seven organizational plaintiffs, four are Qualified Designated Entities ("QDEs") within the meaning of IRCA. A QDE is a non-profit organization that has contracted with the INS to receive and screen legalization applicants under IRCA and to provide assistance and information to aliens seeking the benefits of the legalization program. 8 U.S.C. § 1255a(c). Congress specifically intended QDEs to serve as a buffer between the INS and the undocumented alien community, reasoning that the legalization program could not succeed unless non-Government counseling and assistance organizations were available to encourage prospective applicants to learn about the program and apply when eligible.

plaintiff Hermandad also alleged standing to bring suit on behalf of its members. *See* CR 44 ¶ 16. The fact that at least two of the organizational plaintiffs have standing on behalf of their members renders relatively insignificant petitioners' challenge to the Circuit's decision on the standing of the organizations based on injuries they directly suffered. *See, e.g., J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 485, n.2 (9th Cir. 1984), *quoting Spokane Arcades, Inc. v. Eikenberry*, 544 F. Supp. 1034, 1037 n.1 (E.D. Wash. 1982); *Gulf Oil Corp. v. F.E.R.C.*, 706 F.2d 444 (3d Cir. 1983).

To establish standing for injury in fact, an organizational plaintiff must plausibly allege that an agency's illegal action is the cause of some threatened or actual injury to the organization and that this injury can be remedied by the court. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S.464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982) (citations omitted). The organizational plaintiffs must also show that their injury is within the zone of interests protected or regulated by the statute. *Valley Forge*, 454 U.S. at 475, 102 S.Ct. at 760.

As the Circuit held, "[t]he record demonstrates that [the] INS's [challenged] regulations ... caused harm to the organizations by draining organizational resources and impairing their ability to assist and counsel nonimmigrants." App. 10a. To the extent respondents' standing rested upon organizational rather than membership injury, the allegations of their Complaint may be summarized as falling into four categories: (1) allegations that defendants' dissemination of its unlawful IRCA eligibility criteria impaired the organizational plaintiffs' ability to carry out their core function of providing

accurate information to prospective applicants concerning legalization eligibility requirements; (2) INS's unlawful policies undermined the organizational plaintiffs' ability to effectively assist potentially eligible aliens to achieve legalization; (3) INS's policies forced the organizational plaintiffs to devote significant resources of time, manpower and money to counteract the effects of INS's unlawful policies, particularly with respect to aliens who had "self-disqualified" from the legalization program; and (4) INS's unlawfully policies caused the QDE organizational plaintiffs financial harm by causing the QDEs to be denied their application processing fee.[13] These allegations sufficiently assert concrete injury to the organizational plaintiffs' core functions caused by the INS's challenged policies, which would be redressable by the requested invalidation of those policies.

These allegations are legally indistinguishable, for purposes of standing, from the allegations in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the leading case on organizational standing. In *Havens*, the Housing Opportunities Made Equal organization ("HOME") brought suit against a real estate firm under the 1968 Fair Housing Act, alleging that the firm had engaged in unlawful racial steering practices and had furnished false information about the availability of housing to Blacks. HOME, whose purpose was "to make equal opportunity in housing a reality in the Richmond Metropolitan Area," *id.* at 368, claimed that these discriminatory practices "frustrated the organization's counseling and referral services,

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13 First Amended Complaint, CR 44, pp. 8-15.

with a consequent drain on resources." 455 U.S. at 368-69. The Supreme Court found these allegations sufficient:

> If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities . . . constitutes far more than simply a setback to the organization's abstract social interests.

455 U.S. at 379.[14]

INS's petition focuses solely on the Circuit Court's conclusion that the harm suffered by the organizational plaintiffs "'fall squarely within the zone of interests protected by IRCA.'" Pet.Cert. at 7, *quoting* App. 10a. The court of appeals held that "[t]he organizational plaintiffs provide services to an identifiable group of individuals that Congress specifically intended organizations such as these to represent." *Id.* Congress provided special status for community organizations so that they could assist the Attorney General "to encourage participation among undocumented aliens who fear coming forward ..." H.R.Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 73 (1986), reprinted in 1986 U.S.C.C.A.N 5649, 5677;

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[14] The plaintiff HOME's complaint alleged simply that it "has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services. Plaintiff HOME has had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices." *Id.* at 379.

see also 8 U.S.C. § 1255a(c)(1)-(4) (1988).[15] As we noted above, four of the organizational plaintiffs are QDEs whose role in implementing the amnesty program is defined in IRCA. INS was required by statute to contract with QDEs to receive and screen legalization applicants under IRCA and to provide assistance and accurate information to applicants seeking the benefits of the legalization program. 8 U.S.C. § 1255a(c).[16]

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[15] The IRCA legislative history specifically explains that Congress intended "voluntary agencies" to play a central role in outreach, counseling and processing applications:

> The Committee has learned that legalization programs in other countries have usually produced a low rate of participation among the eligible candidates. At least part of the reason is distrust of authority and lack of understanding among the undocumented population. The Committee hopes that by working through the voluntary agencies, the Attorney General will be able to encourage participation among undocumented aliens who fear coming forward . . . [T]he bill authorizes the Attorney General to fund outreach service and provides for an extensive education and outreach program prior to the application period.

H.R.Rep. No. 99-682(I) at 72-73.

[16] INS argues that the organizations have no independent cause of action to challenge INS's interpretation of IRCA, "any more than a lawyer has independent standing to challenge substantive or procedural rulings of an agency that may affect the lawyer's clients." Cert.Pet. at 7. Clearly, the lower courts in this case addressed the issue of organizational standing, not lawyers' standing to sue on behalf of their clients. In any event, unlike the QDE organizational plaintiffs, lawyers were not provided any special status under IRCA.

The zone of interests requirement is not particularly stringent, and is meant only to preclude standing for those whose interests are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Securities Industry Association*, 479 U.S. 388, 399, 107 S.Ct. 750, 757, 93 L.Ed.2d 757 (1987).[17]

INS's "zone of interest" analysis is approached with a purely tautological argument. Assuming the very merits of the jurisdictional question, defendants argue that *because* IRCA does not permit organizational plaintiffs to obtain judicial review of INS's eligibility criteria, the plaintiff organizations could not be within the statutory zone of interests. Cert.Pet. at 9. That argument assumes the merits of the case, and is not a basis for opposing standing. As the Circuit concluded, the organizational plaintiffs' interest in aiding applicants in the legalization program falls squarely within the "zone of interests" that is protected by IRCA.

In any event, as we note above, INS's current appeal to the Ninth Circuit seeks the same thing the agency hopes to achieve by having this Court grant certiorari, vacate and

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[17] *Accord, Clarke v. Securities Industry Ass'n*, __ U.S. __, 107 S.Ct. 750, 757 (1987) (zone-of-interest analysis is "not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff"); *Assoc. of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 154 (1970); *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 939 (D.C. Cir. 1986) (zone of interests include those related to the "promotion of the knowledge, enjoyment and protection of the rights created by a particular statute").

remand; namely, further consideration "of the organizational standing portion of [the Circuit's] decision in light of this Court's analysis in *CSS* ..." Pet.Cert. at 9. For all of the reasons discussed above, this Court should not grant certiorari.[18]

4. Substantive Ruling re § 265 (Category 1) Cases

INS next turns to a substantive ruling of the court of appeals and urges this Court to grant certiorari, vacate and remand because of a later issued administrative decision making it "possible that the court [of appeals] would [now] reach a different" result. Cert.Pet. at 10; id. at I (Questions Presented # 4).[19] The INS does not seriously argue that the court of appeals' decision was incorrect on the merits, nor does

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[18] While the Ninth Curcuit's decision on organizational standing is in conflict with a recently issued decision in *Ayuda v. Reno*, (D.C. Cir.), No. 88-5226 (Oct. 26, 1993), Slip Op. at 10, (1) the D.C. Circuit has not yet entertained a motion for rehearing *en banc*, (2) INS's pending appeal to the Ninth Circuit may resolve the conflict, and (3) in any event INS does not now seek plenary review on the issue of organizational standing, but rather asks this Court to vacate and remand for further consideration in light of *CSS*, something already taking place as a result of INS's current appeal to the Ninth Circuit.

[19] INS cites *Chicago v. Environmental Def. Fund*, 113 S.Ct. 486 (1992), a case in which this Court vacated and remanded in light of a subsequently issued administrative directive by the Environmental Protection Agency. In that case, however, the new directive completely reversed the EPA's position on the conflict between the parties. *EPA Defense Fund Inc. v. City of Chicago*, 985 F.2d 303, 304 (7th Cir. 1993). In this case, the belated administrative decision simply reiterates the basic position of the INS in the lower courts.

the agency explain why this issue is worthy of plenary review. Indeed, the administrative decision INS relies upon simply reiterates the position adopted by the agency before the lower courts, leaving us to guess why the Circuit may now reach a "different" result. Nothing prevents the INS from seeking reconsideration in the district court of the § 265 issue in light of *Matter of H.* Rule 60(b), Fed. R. Civ. Pro. Moreover, if INS's current appeal to the Ninth Circuit on the jurisdictional issues in light of *CSS* succeeds, the merits of the court of appeals' earlier decision will clearly become moot.

This portion of the Circuit's decision involves nonimmigrants who failed to comply with the registration requirements of INA § 265, 8 U.S.C. § 1305 (1976) (amended 1982) (Category 1 cases). Under § 265, nonimmigrants were required to register with INS by January 30 of each year and to notify INS of their address at the end of each three-month period. Respondents argued before the district court that failure to comply with § 265 was sufficient to show that these nonimmigrants were unlawful residents of the U.S. and that their unlawful status was "known to the government" within the meaning of IRCA. The INS argued before the district court and court of appeals that its interpretation of IRCA was valid in relation to § 265 nonimmigrants. App. 14a. The district court concluded that INS policy regarding § 265 nonimmigrants was inconsistent with congressional intent and granted both declaratory and injunctive relief. *Id.* The court of appeals affirmed. First, the district court correctly noted that "a nonimmigrant who violated 8 U.S.C. § 1305 (§ 265 of the Immigration and Naturalization Act) faced criminal penalties and deportation." App. 20a, *citing* 8 U.S.C. § 1306(b) (1988)

(defining penalties for violating § 265); *Fong v. INS*, 308 F.2d 191, 193 (9th Cir. 1962) (alien deportable for failing to file pursuant to § 265). Because of the consequences that aliens would suffer by violating § 265, the government's argument that "noncompliance with that section may not prove unlawful status is unavailing." App. 21a.[20] Second, the lower courts concluded that § 265 violations were "known to the government" because the INS had no periodic address report on file for the alien as required by statute and regulation. App. 21a. The record shows that "before January 1, 1982, the INS reviewed agency records to determine whether nonimmigrants had complied with the reporting requirements under section 265." *Id.* The absence of the required § 265 report identified those in violation. *Id.* As a consequence of its own practices, the INS had "actual knowledge of an alien's unlawful status." *Id.* Finally, a reading of IRCA's legislative history supports the lower courts' conclusion that INS policy regarding § 265 violators is not consistent with congressional intent. The legislative history demonstrates that the House Judiciary Committee was concerned that "[u]nnecessarily rigid demands for proof of eligibility could seriously impede the success of

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[20] INS made the additional argument that a § 265 violation must be "willful," and not merely inadvertent, for it to be unlawful. The INS reasoned that it could not have known, simply by looking at an alien's file, whether the alien's failure to file a section 265 report was "willful" and thus unlawful. The lower courts disagreed. Willfulness is not an element of a § 265 violation; instead, an alien threatened with deportation may merely invoke the absence of willfulness as an affirmative defense. The alien would have the burden of establishing this defense. App. 21, n. 16.

the legalization effort." H.R.Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 73 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5677.[21] Congress believed that "the legalization program should be implemented in a liberal and generous fashion ..." *Id.* at 5676. The court of appeals properly concluded that INS policy represents an overly restrictive interpretation of IRCA "because it would preclude § 265 nonimmigrants from proving that their unlawful status was 'known to the government.'" App. 22a.

In its petition INS does not challenge the correctness of the lower courts' decisions regarding § 265 applicants. Instead, the agency argues that a recently issued administrative decision in a case styled *Matter of H* sets forth how INS "plans to [treat] Section 265 claimants." Cert.Pet. at 9.[22] INS asserts, without *any* substantive explanation, that it is now "possible" that the court of appeals may reach a "different" result "if it reexamined the issues in light of" *Matter of H*. Cert.Pet. at 10. The extraordinary relief of granting certiorari, vacating and remanding should not be granted merely because of a party's speculation, without analysis, that a lower may "possibl[y]" reconsider in light of a later administrative determination.

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[21] Furthermore, Congress expected "the INS to incorporate flexibility ... permitting the use of affidavits of credible witnesses and taking into consideration the special circumstances relating to persons previously living clandestinely in this country." H.R.Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 73 (1986), 1986 U.S.C.C.A.N. 5677.

[22] The Government filed a copy of *Matter of H* with this Court in a Supplemental Brief for Respondents in *Ayuda v. Reno*, No. 91-1924 in June 1993.

First, the substance of *Matter of H* simply mirrors the position adopted by the INS in defense of its challenged § 265 policy in the lower courts. The INS in *Matter of H* agreed that a violation of § 265 placed an alien in unlawful status. However, precisely as it argued in the courts below, the INS maintained in *Matter of H* that the failure to file a report under § 265 "does not warrant a finding that the applicant's unlawful status was known to the Government as of January 1, 1982." *Matter of H*, attached to Supplemental Brief for Respondents in *Ayuda v. Reno*, No. 91-1924 (June 1993) at 7a.[23] Clearly, the issuance of *Matter of H* provides no basis for this Court to grant certiorari, vacate and remand.

Second, the INS's challenged § 265 policy was "in effect for at least eleven of the twelve months that nonimmigrants had to apply for legalization." App. 17a. Thus, "the INS had a concrete policy in 8 C.F.R. § 245a.1(d) that *excluded* § 265 applicants during most of the amnesty application period." *Id.* (emphasis added). An administrative decision issued long after the application period closed therefore likely will have little impact on the substance of the lower courts' decisions in this case.

Finally, the INS has not argued that the substance of the lower court decisions on the § 265 issue is wrong, or worthy of plenary review by this Court.

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[23] As the court of appeals noted, INS written instructions issued to agency employees "shows that the INS would not consider the absence of a 265 report in the [INS] files as constituting sufficient knowledge by the agency of the nonimmigrant's unlawful status." App. at 17a n. 14. This is precisely the position adopted by the agency in *Matter of H*.

5. Substantive Ruling re Category 2 Cases

Finally, the INS argues that the court of appeals erred in holding that INS deprived respondents of equal protection in its creation of two categories of identically situated nonimmigrants, one which was required to prove through largely unavailable evidence--because of INS's document destruction protocols--that its unlawful status was *actually* "known to the government" before January 1, 1982, and the other which was *not* required to prove government knowledge. Pet.Cert. at I (Questions Presented # 5); *id.* at 11-15.

Of the three categories dealt with by the lower courts in this case, this is the only category which INS actually challenges the merits of the lower courts' decisions. As we will discuss next, INS's arguments are completely without merit, and, in any event, fail to establish that this issue is worthy of plenary review.

This category of nonimmigrants consists of students and employees who violated the terms of their visas before 1982.[24] Under INS policy and regulations, these nonimmigrants would qualify for amnesty only if they prove that the government knew of their unlawful status. 8 C.F.R. s 245a.2(b)(3) (1992). INS regulations did not apply this requirement to another group of similarly situated students and employees.[25] Instead, INS regulations allowed this second group to satisfy IRCA's requirement that their unlawful status was "known to the government" before 1982, merely by showing that their authorized stay in the United States expired "through the passage of time" before 1982. App. 26a; *see also* 8 C.F.R. §

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24 *See* footnote 4, *supra.*

25 *See* footnote 3, *supra.*

245a.2(b)(11)-(12) (1992); 8 U.S.C. § 1255a(a)(2)(B). The district court and court of appeals ruled that INS's regulations violated equal protection because the regulations treated similarly situated groups differently without *any* rational basis for doing so. App. 26a.

In their petition for certiorari, the INS argues that "it was rational for *Congress* to provide separate and more detailed requirements for aliens who originally entered the country lawfully as nonimmigrants." Cert.Pet. at 13 (emphasis added). The petition continues that it was rational for the INS "to limit relief to individuals whose status was plainly unlawful by 1982 ... [and] [a]utomatic expiration of lawful status by the passage of time was one way for an alien's status to become unlawful in a way that was sufficiently clear to justify relief without the need for further proof [that the violation was 'known to the government']." *Id.*

First, the lower courts did not rule, as suggested in the petition, that the statute enacted by Congress violated the constitution. Our constitutional challenge relates solely to INS's regulation.

Second, it was more than "rational" for the INS to decide that "[a]utomatic expiration of lawful status [before 1982] was one way for an alien's status to become unlawful in a way that was sufficiently clear to justify relief without the need for further proof" of illegal status. Cert.Pet. at 13. In fact, that is what the statute required. However, that has *nothing* to do with our constitutional challenge. INS's regulation allowed certain employee and student nonimmigrants (identified above) to establish that their violations of status were "known to the Government" prior to 1982 even though their visa had not

expired "through the passage of time" prior to 1982, and *no* proof was required that their violations of status were "known to the government" before 1982. App. 26a. On the other hand, other similarly situated employee and student nonimmigrants *were* required to prove that their violations of status were "known to the government" prior to 1982. *Id.* The petition therefore completely misconstrues the nature of respondents' claims and the holding of the lower courts.

As the court of appeals recognized, under the equal protection clause of the Fifth Amendment, "'[f]ederal classifications distinguishing among groups of aliens ... are valid unless [they are] wholly irrational.'" App. at 27a, *quoting Sudomir v. McMahon*, 767 F.2d 1456, 1464 (9th Cir. 1985), *citing Mathews v. Diaz*, 426 U.S. 67, 82-83, 96 S.Ct. 1883, 1892-1893, 48 L.Ed.2d 478 (1976). The court of appeals agreed with the district court that "no rational basis between the two groups [of nonimmigrants exists] to justify requiring category two nonimmigrants to meet different proof requirements for showing unlawful status as compared to other nonimmigrant students and employees who were similarly situated." App. at 28a. The petition for certiorari offers *no* rational reason to grant certiorari and vacate the decision of the court of appeals as it pertains to Category 2 applicants.

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CONCLUSION

For the reasons stated, the petition for certiorari is completely without merit and should be denied.

Respectfully submitted.

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